In the Supreme Court of the United States

OCTOBER TERM, 1940.

Nos. 44 and 45.

CHARLES PEYTON WEST, and
MAURICE JOHN WEST,
Petitioners,

vs.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES CIRCUIT COURT OF APPEALS,
FOR THE SIXTH CIRCUIT.

BRIEF OF THE RESPONDENT.

WILLIAM B. COCKLEY,
1759 Union Commerce Building,
Cleveland, Ohio,
Attorney for Respondent.

INDEX.

TABLE OF AUTHORITIES.

Cases Cited or Distinguished.

Text.

Statutes.

Constitution.

In the Supreme Court of the United States

OCTOBER TERM, 1940.

Nos. 44 and 45.

CHARLES PEYTON WEST, and
MAURICE JOHN WEST,
Petitioners,

vs.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES CIRCUIT COURT OF APPEALS,
FOR THE SIXTH CIRCUIT.

BRIEF OF THE RESPONDENT.

OPINIONS BELOW.

The opinion of the Circuit Court of Appeals is reported in 108 Fed. (2) 347 and is contained in the record beginning at page 136. The opinion of the District Court is not reported but is contained in the record beginning at page 116.

STATEMENT OF THE CASE.

A sufficient general statement of facts is made in the plaintiffs'* brief. Such additional facts as need be referred to will be stated in connection with particular arguments.

---

*Since this is the sixth court to hear this case it will avoid confusion to refer to the petitioners as "plaintiffs" throughout, and to the respondent as "defendant."

SUMMARY OF ARGUMENT.

The judgment in the Circuit Court of Appeals in favor of the defendant is supported upon four separate and wholly independent grounds, none of which rests solely upon that court's application of the doctrine of *Erie Railroad v. Tompkins,* 304 U. S. 64 (1938).

These grounds are:

I. The defendant was not negligent in transferring its stock to the life tenant without limitation. Such a transfer was in accordance with the well settled law and practice in Ohio that, in the absence of objection by the remaindermen or restriction by the will or the court, a life tenant is entitled to distribution and the full possession and enjoyment of cash, bonds, stocks and other personal property. The Circuit Court of Appeals in its opinion ignored this settled law of Ohio and held the transfer was wrongful.

II. The action was barred by the statute of limitations. The first transfer occurred in February, 1927 and the second in November, 1929. Plaintiffs' action in the state courts was filed in June, 1934. Demand was made in June, 1937, and this suit filed in July, 1937. The Circuit Court of Appeals correctly held that the applicable Ohio statute of limitations is four years and that the plaintiffs' action was barred on either of two alternative grounds: (a) since the rule of *Erie Railroad v. Tompkins* did not require it to follow the ruling of the Ohio Court of Appeals as to the necessity of a demand in this case, the statute began to run upon wrongful transfer in 1927, and (b) that if demand were necessary to the cause of action, as the Ohio Court of Appeals held, the plaintiffs could not indefinitely postpone the making of that demand and thus nullify the statute of limitations; that a demand made after the expiration of the period of limitations was not seasonably made and was barred under well settled rules prevailing in Ohio and elsewhere.

III. The plaintiffs were guilty of laches. The Circuit Court of Appeals so held.

IV. This same controversy between these same parties was finally adjudicated by the final judgment rendered by the Ohio Court of Appeals. The Circuit Court of Appeals having disposed of this case on the grounds stated in II and III above found it unnecessary to pass upon this question.

V. The Circuit Court of Appeals was entirely correct in holding that it is not bound by the opinion of the Ohio Court of Appeals for these reasons: The opinion of the Ohio Court of Appeals was a misapplication of well settled Ohio law and a misconstruction of the decisions of the Supreme Court of Ohio and of a former decision of the Circuit Court of Appeals for the Sixth Circuit applying Ohio law. An Ohio Court of Appeals is not the highest court of the state. All its decisions are subject to review by the Supreme Court of Ohio. Its decisions are only binding on the Common Pleas Court of Cuyahoga County. They are not binding on the Common Pleas Courts in the other eighty-seven counties of Ohio or on the Courts of Appeals in the other eight districts of Ohio. The opinion of the Ohio Court of Appeals in this case cannot be accepted without denying full faith and credit to the judgment of that court in this same case since the opinion is inconsistent with the judgment.

VI. The plaintiffs' claims as to relief are based upon the common law doctrine that a life tenant of real estate, who by livery of seizin conveys a greater estate than he has, forfeits his life estate and the remainder is accelerated. This doctrine has never had any application in Ohio as to real estate and has never had any application anywhere as to personal propert. If the doctrine were recognized in this case the effect would be the enforcement of a forfeiture by a court of equity.

ARGUMENT.

I.

THE DEFENDANT WAS NOT NEGLIGENT IN TRANSFERRING ITS STOCK TO GRACE C. WEST WITHOUT LIMITATION.

Liability in this case is predicated on the claim that the defendant was negligent in permitting the transfer of shares of its stock from the estate of the father to the stepmother, a life tenant, without noting on the certificate a limitation of her interest. This transfer was made February 2, 1927, on the authority of assignments and other papers that will be discussed later. In November, 1929, the stepmother assigned her certificate to Paine Webber & Co., her brokers, who were purchasers for value, and upon the assignee tendering the endorsed certificate to the defendant a new certificate was issued upon the assignee's order (R. 47).

There was, of course, nothing negligent or wrongful about the second transfer. Had the defendant refused to issue the new certificate upon surrender of the old certificate properly endorsed it would have been liable to the assignee for conversion under the Uniform Stock Transfer Act. *Finance Company v. Booth,* 111 O. S. 361 (1924). Plainly, therefore, the second transfer was not the proximate cause of any injury to the plaintiffs. Judge Lurton pointed this out in a very careful opinion in *Smith v. Nashville & D. R. Co.,* 91 Tenn. 221, 18 S. W. 546 (1892). The only transfer, therefore, to be considered in determining the defendant's liability is that of 1927.

To understand the procedure in the Probate Court of Cuyahoga County, which preceded the 1927 transfer, it is necessary to state the settled law and practice in Ohio in the administration of estates where a legatee of personal property is given a life estate with remainder over to other persons.

In 1932 the Legislature of Ohio enacted a Probate Code which correctly declared the law and practice existing prior

to that date as to the right of a life tenant to distribution of personal property. The pertinent provision is as follows:

> "G. C. §10509-185. When by a last will and testament the use or income of personal property is given to a person for a term of years or for life, and some other person has an interest in such property as remainderman, the court, unless such last will and testament otherwise provides, shall have authority to deliver such personal property to the person having the limited estate, with or without bond, as the court may determine; or the court may in its discretion order that such property be held by the executor or some other trustee, with or without bond, for the benefit of the person having the limited estate. If bond is required of the person having the limited estate, or of the trustee, it may be increased or decreased, and if bond is not required in the first instance it may be required, at any time prior to the termination of the limited estate, at the discretion of the court."

It will be noted that a life tenant of personal property whether it consists of cash, notes, bonds, stocks or tangible personal property, unless the will otherwise provides or the Court otherwise directs, is entitled to complete distribution, possession and control of that property. The remainderman is protected by authority vested in the Court to require a bond of the life tenant or to appoint a trustee of the property during the life of the life tenant. This Code certainly clarified and perhaps extended the powers of the Court in such case, a matter in which we are not presently interested.

As to distribution to the life tenant the statute declared the settled law and practice in Ohio prior to the adoption of the Probate Code is shown by the following, among other cases: *Ratliff v. Warner,* 32 O. S. 334 (1877); *Lapham v. Martin,* 33 O. S. 99 (1877); *Martin v. Lapham,* 38 O. S. 538 (1883); *Flickinger v. Saum,* 40 O. S. 591 (1884); *Posegate v. South,* 46 O. S. 391 (1889); *Johnson v. Johnson,* 51 O. S. 446 (1894); *Wilson v. Wilson,* 21 O. L. A. 137 (Court of Appeals of Monroe County, 1935);

Blume v. Thompson, 15 O. N. P. (N. S.) 97 (1913); *Ohio Savings Bank & Trust Company v. Clark*, 7 O. App. 6 (1916).*

Some of these cases were executory limitations of personal property and some were life estates with or without power in the life tenant to consume. In all cases the rule was the same, that the life tenant or first taker was entitled to distribution of the personal property and the executor was fully discharged by making it. In the last case above cited the estate consisted largely of stocks and the widow to whom distribution was ordered had only a life estate with remainder over to other persons.

We now turn to the circumstances under which the defendant made the transfer of February, 1927. When time came for distribution Grace C. West as executrix filed an application in the Probate Court of Cuyahoga County reciting that the debts of the estate had been paid, that there were in the estate certain stocks, including 92 shares of the defendant's stock, and that by the terms of the last will and testament these stocks were bequeathed to her for life. The prayer was—

> "Your applicant therefore asks the court to transfer said stocks to her, the within named Grace C. West." (R. 67.)

The plaintiffs signed a written consent to that application in the following language:

> "We the undersigned, Charles P. West, Jr., and Maurice J. West, hereby consent to the foregoing distribution in kind." (R. 67.)

Having in mind the settled law and practice in Ohio as above discussed the recitals of this application entitled Grace C. West to complete possession and control of the

---

* In the plaintiffs' brief in the court below, p. 9, it was said:

> "A life tenant is entitled to possession; therefore it was the duty of the probate court to approve distribution in kind to her, and the duty of the remaindermen to consent to it.
>
> "*Flickinger v. Saum* (1884) 40 O. S. 591;
> *Posegate v. South* (1889) 46 O. S. 391."

personal property. Neither the prayer of the application nor the consent of these plaintiffs suggests any limitation upon her estate. The plaintiffs might have asked the court to appoint a trustee or require a bond. Also they might have refused consent unless the court gave express instructions to transfer the stocks to Grace C. West for life and to note on its records the interest of the plaintiffs in the remainder. They did none of these things but instead consented to the distribution as prayed.

Acting upon this application the Probate Court the same day made an order of distribution as to these stocks including that in the defendant which, after reciting the substance of the application, the terms of the will and the consent of the plaintiffs as next of kin, ordered as follows:

> "Wherefore said application is granted, and it is by the Court ordered that said applicant, Grace C. West, be and she is hereby authorized and directed to distribute in kind and transfer unto herself as the widow of said Charles P. West, deceased, and the distributee entitled thereto, the aforesaid stocks, as prayed for." (R. 68.)

That order is not ambiguous. It names Grace C. West as the distributee entitled to distribution of the stocks in accordance with the settled law of Ohio.

On February 2, 1927, the defendant received from Grace C. West as executrix the following papers: (1) certificates for 92 shares of its common stock, each duly assigned to Grace C. West (R. 46, 49); (2) certificate of Grace C. West's appointment as executrix (R. 47, 65); (3) a certified copy of the will (R. 47, 65-6); (4) a certified copy of the application for distribution containing the plaintiff's consent (R. 47, 66-7); and (5) certified copy of the journal entry of the Probate Court of Cuyahoga County ordering distribution (R. 47, 67-8). Accordingly the defendant issued a new certificate for 92 shares to Grace C. West without limitation.

There is no claim that the defendant did not know from these papers that Grace C. West was given only a life estate

by the will. The will clearly so stated and both the application and order of distribution so recited. It *is* claimed that under the settled law of Ohio in the absence of restriction in the will or objection by the remaindermen or the Court Grace C. West as life tenant was entitled to have the stock registered in her name without limitation just as she also took title to money, notes and other personal property (R. 32-3).

It will be noted that the Probate Court in its order took precisely the same view of Grace C. West's rights and the plaintiffs' consent thereto as did this defendant. Both, we submit, under the well settled law of Ohio were justified in so doing and there was no negligence of any kind on the part of the defendant.

Under the law of Ohio if an executor had turned over to Grace C. West under precisely similar conditions negotiable bonds or moneys the executor would have been under no liability to the remaindermen. By what reasoning is it held that this defendant owed a greater duty to these plaintiffs than did the executor? Or by what reasoning is it held that the defendant owed a duty to the plaintiffs to protect them against their own failure to require either a bond or a trustee or a modification of the order of distribution.

Both lower courts ignored the settled law and practice in Ohio on the theory that the application for distribution to which the plaintiffs consented was merely a distribution in kind instead of in cash as provided by Ohio General Code Section 10839.* Where an executor in Ohio is author-

---

* "Sec. 10839. An executor or administrator who has paid all the debts of an estate, but has in his possession notes, bonds, stocks, claims, or other rights in action, belonging thereto, with the approval of the probate court entered on its journal, and the assent and agreement of the persons entitled to the proceeds of such assets as distributees, including executors, trustees and guardians, may distribute and pay these over in kind to those of such distributees as will receive them."

ized to sell the assets of an estate and make distribution in cash that section provides that if he wants to make distribution in kind he must have the consent "of the persons entitled to the proceeds of such assets as distributees." This, of course, was not that kind of a case. The Executor had no authority to convert the estate into cash. All the property was left to Mrs. West for life with remainder to these plaintiffs. This has many times been held to have the effect of a specific legacy. There was no necessity, therefore, for any consent to a distribution in kind instead of in cash for the will contemplated only a distribution in kind.

Moreover we suggest that this defendant would not have been guilty of negligence if there had been no consent by the plaintiffs. In other words, if the order for distribution had been made on the basis of an application after mere notice to the plaintiffs the result would have been precisely the same because under the settled law of Ohio Mrs. West was entitled to the distribution of all personal property in the absence of objection by the remaindermen or a restriction imposed upon her either by the will or the court.

The District Judge further suggests that the order of distribution in the Probate Court in this case could not change the rights of the parties as fixed by the will in accordance with well settled Ohio cases such as *Swearingen v. Morris,* 14 O. S. 424 (1863) and *Armstrong v. Grandis,* 39 O. S. 368 (1883). Those are cases in which an improper distribution of the estate is made by the order of distribution. For one reason or another persons not entitled to distribution receive it. In such cases it has been held that the order of distribution is not conclusive. However, that is not this case. Mrs. West was entitled to distribution. Under similar circumstances it has been repeatedly held, as we have noted, that an Ohio executor distributing personal property to a life tenant makes a proper distribution and cannot later be charged with the loss of the estate in the hands of the life tenant. Both G. C. Section 10839 and the Ohio cases referred to by the District Judge are wholly beside the point.

Plainly under the settled law of Ohio Mrs. West was entitled to receive complete distribution of all personal property. The Probate Court so ordered without objection from the remaindermen. The defendant in recognizing this settled Ohio law and practice was not guilty of any negligence and the judgment below should be sustained on this sole ground.

II.

THIS ACTION IS BARRED BY THE STATUTE OF LIMITATIONS.

The statute of limitations in this case began to run when the alleged wrongful transfer was made in 1927. This is true whether or not the doctrine of *Erie Railroad v. Tompkins, supra,* requires the federal courts to hold that a demand in this case was necessary. The general rule and the rule in Ohio here applicable is that if the plaintiffs must make a demand before maintaining their action they cannot indefinitely toll the statute of limitations by mere failure to make that demand; that the demand must be seasonably made, and that if it is not made within the period fixed by the statute of limitations it comes too late.

In *Douglas v. Corry,* 46 O. S. 349 (1889), an action was brought against an attorney alleged to have collected money for a client for failing to pay it over. The petition did not allege any misrepresentation or concealment by the attorney. It alleged that he had collected some money in 1867 and more in 1871 and that a necessary demand upon him had been made in 1880. This suit was brought in 1886, within six years after the demand. The statute of limitations applicable to such cases is six years. The demand, therefore, was not made within the period of the statute although the suit was brought within the period of the statute after demand. The court held that the action was barred, saying in the opinion, page 352:

"It is true that it is generally held that an action cannot be commenced against an attorney for money

> collected until a demand has been made by the client. * * *. The client has it in his power, by making the demand, to commence the action at any time after the attorney has received the money and refused on demand to pay it over; and, by delaying the demand, he cannot prevent the running of the statute."

In *Townsend v. Eichelberger,* 51 O. S. 213 (1894), a case where a demand was held to be necessary but was not made within the period of the statute, the court thus stated the law in its second syllabus:

> "* * * where there are no circumstances of fraud or concealment on his part, the statute of limitations begins to run from the time it was his duty on demand to pay it to the parties entitled to it."

The same principle was applied to an action by a stockholder for dividends in *Stearns v. Hibben Dry Goods Company,* 11 O. C. C. (N. S.) 553 (1909), affirmed without opinion 84 O. S. 470 (1911).

In accordance with this principle the Circuit Court of Appeals in its opinion below (R. 142) said:

> "But assuming that demand and refusal are necessary to the accrual of this action, it is the law that when some preliminary action is a prerequisite to the bringing of the suit, and such action rests with the claimant to perform, he cannot defeat the operation of the statute by failure to act or by long and unnecessary delay. Otherwise he would have it in his power to defeat the purpose of the statute. *Atchison, Topeka & Santa Fe Rd. Co. v. Burlingame Tp.,* 36 Kan. 628; *Palmer v. Palmer,* 36 Mich. 487; *Oleson v. Wilson,* 20 Mont. 544; *Winchester & Lexington Turnpike Co. v. Wickliffe's Admr.,* 100 Ky. 531; *Barnes v. Glide,* 117 Cal. 1. Cf. *Bauserman v. Blunt,* 147 U. S. 647; *United States v. Sligh,* 24 Fed. (2d) 636. This is also the law in Ohio (*Keithler v. Foster,* 22 Ohio St. 27). The demand under such circumstances is not to be delayed beyond the period of the statute, which in this case is four years."

We shall show later in this brief that the rule of *Erie Railroad v. Tompkins* does not require the federal courts

to hold that any demand was necessary here, in which event the cause of action clearly accrued in 1927.

Under any theory, therefore, the statute of limitations started to run in 1927 and seven years elapsed before the plaintiffs brought suit in the state courts and ten years before they made any demand or brought suit in the federal courts. The applicable statute of limitations in Ohio is four years.

This is an action in equity. An action for damages at law was brought in the state court and might again have been brought here. It is, of course, well settled that where equity has concurrent jurisdiction with the law the legal statute of limitations is applied in equity. See *Russell v. Todd*, 309 U. S. 280 at 289 (1940); *Metropolitan Bank v. St. Louis Dispatch Company*, 149 U. S. 436 at 448 (1893); *Longworth v. Hunt*, 11 O. S. 194 at 201 (1860); *Seeds v. Seeds*, 116 O. S. 144 at 152 (1927); *Keys v. Leopold*, 214 N. Y. 189 (1925). A leading case on this subject involving an improper transfer of stock is *Casper v. Manufacturing Company*, 159 Wis. 517 (1914).

The Circuit Court of Appeals held that an action by remaindermen for injury to the remainder falls within paragraph 4 of Ohio G. C. 11224. The entire section reads as follows:

> "§ 11224. *Four years; certain torts.*—
>
> An action for either of the following causes, shall be brought within four years after the cause thereof accrued:
>
> 1. For trespassing on real property;
>
> 2. For the recovery of personal property, or for taking or detaining it;
>
> 3. For relief on the ground of fraud;
>
> 4. For an injury to the rights of the plaintiff not arising on contract nor hereinafter enumerated.
>
> If the action be for trespassing under ground or injury to mines, or for the wrongful taking of personal property, the causes thereof shall not accrue until the

wrongdoer is discovered; nor, if it be for fraud, until the fraud is discovered."

It will be noted that whether this action falls within paragraph 2 or paragraph 4 is wholly immaterial so far as length of time is concerned. The four year limitation applicable to both expired long prior to either suit or demand. This is also true if the statute started to run with the second transfer in 1929.

To avoid having their action barred the plaintiffs have heretofore always claimed that their action came within paragraph 2; that it was an action for the "taking of personal property"; that they did not "discover the wrongdoer" until 1934, and that in consequence they came within the savings clause of the statute. They now further claim for the first time that the action in this case is not a tort action but an action *ex contractu* and that in consequence this whole section is not applicable but that other sections with limitations of either 6 or 15 years are applicable (Plaintiffs' brief, pp. 23-25). We shall discuss each of these contentions.

The Circuit Court of Appeals in this case held:

"Plaintiffs claim that this is an action for the recovery of personal property or for taking or detaining it, and that the cause did not accrue until the wrongdoer was discovered. If paragraph 2 were the controlling provision, the saving clause would not aid the plaintiffs here, for the principal wrongdoer might easily have been discovered in 1930, when Maurice John West was informed that some of the estate stocks had been sold, and under the statute notice sufficient to put the claimant upon inquiry is equivalent to discovery. 19 *Ohio Jur.*, p. 462. But paragraph 2 is not applicable. The remaindermen have no right of possession so long as the life estate exists. The injury which they have suffered is an injury to their right of remainder. The applicable provision is paragraph 4, 'For an injury to the rights of the plaintiff not arising on contract nor hereinafter enumerated,' which carries

with it no saving clause, and the action is barred under the statute." (R. 141.)

It thus held (1) that the plaintiffs did not bring themselves within the savings clause of paragraph 2 and (2) that paragraph 4 is the applicable one and it has no savings clause. Perhaps the reasons for these holdings should be more fully stated.

Prior to the adoption of a Code of Civil Procedure in Ohio in 1851 the statute of limitations named the common law actions such as trover, replevin, etc. When common law actions were abolished the statute of limitations had to be changed. In consequence we find in paragraph 2 of G. C. 11224 in place of replevin the phrase "recovery of personal property," in place of trover the "taking of personal property" and in place of detinue the "detaining of personal property." Compare *Chase's Statutes of Ohio,* Vol. III, p. 1768 (1835) with 51 O. L. 57, Sec. 15.

It was, of course, well settled at common law that to maintain trover the plaintiff must be entitled to immediate possession. Trover could not be brought by a remainderman or by a mortgagee before breach. Their remedy was a special action on the case which is included in the general description of paragraph 4 of G. C. 11224. It was early held in Ohio in *Allison v. McCune,* 15 Ohio Rep. 726 (1846), that a mortgagee who had no immediate right to possession necessary to maintain an action of trover could nevertheless maintain a special action on the case against one lessening the mortgage security by removing machinery and other fixtures from the mortgaged property. This was also the principle applied by the Kentucky Court in *Coffey v. Wilkerson,* 58 Ky. 101 (1858) and *Yeager v. Bank,* 127 Ky. 751 (1908), cited in plaintiffs' brief, pages 30 and 31. It follows, as the Circuit Court of Appeals held, that this action by remaindermen falls not under paragraph 2 but under paragraph 4 for which there is no savings clause.

However, even the savings clause for paragraph 2 does not aid the plaintiffs. They alleged in their petition

and attempted to prove no more than that they "had no knowledge of said wrongful acts of the defendant and of Grace C. West until March, 1934" (R. 23). They did not allege any acts on the part of the plaintiffs to inform themselves as to the record title of the shares. They did not allege any acts on the part of the defendant which prevented the plaintiffs from acquiring full knowledge. They did not allege any concealment or other conduct by the defendant that in any way misled, hindered or prevented the plaintiffs from acquiring full knowledge. On the trial Maurice J. West admitted that he was told in June of 1930 by Mrs. West's sister, with whom she was then living, that Mrs. West "had suffered great losses in the stock market" and that "our securities" might be gone (R. 30). However, they made no inquiry of the defendant until March, 1934, when the defendant promptly and fully answered their inquiry (R. 101).

Both by pleading and evidence they thus rely upon mere want of knowledge not induced by any act of the defendant to bring them within the savings clause of the statute. This in Ohio is not sufficient.

In *Foster v. Mansfield etc. R. R. Co.*, 146 U. S. 88 (1892), Mr. Justice Brown made a very wise and applicable observation at page 99:

> "The defence of want of knowledge on the part of one charged with laches is one easily made, easy to prove by his own oath, and hard to disprove; and hence the tendency of courts in recent years has been to hold the plaintiff to a rigid compliance with the law which demands, not only that he should have been ignorant of the fraud, but that he should have used reasonable diligence to have informed himself of all the facts."

A statement that has been often quoted appears in *State ex rel. v. Standard Oil Company*, 49 O. S. 137 (1892), at page 188, as follows:

> "It is further contended that the provision does not apply by reason of the fact, as averred in the peti-

> tion, 'that the plaintiff had no knowledge of the existence of either of the aforesaid agreements, or of the acts hereinbefore recited, until the latter part of the year 1889.' *The general rule is that a party's want of knowledge does not prevent the running of the statute of limitations against an action that has accrued in his favor; and the only exception is concealment or fraud on the part of the defendant,* which is expressly confined by our statute to 'an action for relief on the ground of fraud.' § 4982 Revised Statutes. This is not such an action; and fraud in fact is not averred, it is simply want of knowledge on the part of the plaintiff." (Italics supplied.)

Section 4982 Revised Statutes is now G. C. 11224.

Very recently in *State ex rel. v. Industrial Commission,* 130 O. S. 185 (1935), it was held, syllabus 3:

> "A claimant's lack of knowledge of facts giving rise to a right of action or a claim for compensation does not prevent the running of the statute or postpone the commencement of the period of limitation; and the statute is not tolled by the failure of an employer to disclose facts within his knowledge which would support a claim against him."

The Court of Appeals of Cuyahoga County has recently applied the foregoing principles to the very provision of G. C. 11224 now under consideration. The Court said in *Klein v. Linn,* 10 O. L. Ab. 560 (1931), at 561:

> "Under Sec. 11224 G. C. an action for recovery of personal property must be brought within four years after the cause thereof accrued.
>
> "A right of action in trover accrues at the time of conversion. It is immaterial whether the plaintiff knew of the conversion or not unless the fact of the conversion was fraudulently concealed from him."

The plaintiffs knew in 1927 that the entire estate had been delivered to the life tenant, Grace C. West. They knew that the only two persons in the world who could effect an improper transfer were Grace C. West and this

defendant—Grace C. West because she held the certificate and this defendant because it recorded transfers. To keep themselves fully apprised it was only necessary for these plaintiffs to inquire of one or the other or both. Had they merely addressed a letter to this defendant at any time prior to March, 1934, they could have ascertained the facts precisely as they did ascertain them by letter in March, 1934. Or had they at any time after 1927 examined the public records of the Probate Court they could have discovered the order of distribution.

"Failure to discover" implies "effort to discover." Mere want of knowledge without the slightest effort to discover what even casual inquiries would have revealed is not sufficient. In fact the law charges the plaintiffs with all the knowledge that reasonable vigilance would disclose. Certainly they have not brought themselves within the savings clause of the Ohio statute.

Finally, it is now claimed by the plaintiffs for the first time that this action is *ex contractu*. It is difficult to be patient with such an argument at this late date and particularly in view of the fact that in its present brief the plaintiffs repeatedly refer to the "tortious act" (p. 29), "conversion of the stock" (p. 29), "conversion by a life tenant" (p. 30), etc. Finally, at page 38, the plaintiffs say—

> "It (the defendant) thus becomes a participant in the life tenant's act of conversion."

The plain fact is that the wrong relied upon from the beginning is an alleged wrongful and negligent transfer of stock in 1927. The plaintiffs were not then and are not now stockholders of the defendant. They are not entitled to certificates, dividends or voting rights. There has been at no time a relation of corporation and stockholder. To cite cases holding that the relation between *stockholder* and a corporation is *ex contractu* is wholly beside the point.

On any theory the statute of limitations in this case has

long since run. The claim was barred in 1934 when the first action was brought in the State Court and was still barred in 1937 when the present demand was made and action brought.

III.

THIS ACTION IS BARRED BY LACHES.

That laches existed in this case is shown by a bare recital of the undisputed facts as follows:

Plaintiffs were respectively 28 and 30 years of age when their father died in 1926 (R. 122). Maurice J. West was at that time a third year law student. He was admitted to the Bar in August, 1927 (R. 23). He continued to live with his step-mother, Grace C. West, from the death of the father until September, 1928 (R. 23). He discussed family affairs with her and knew that she speculated in the market (R. 22-3).

He testified that when the application and order of distribution were made and consented to by him he knew that the securities would be transferred to his step-mother "in some form," but did not know that they would be transferred to her "without limitation" (R. 24). Asked if during the year and a half that he lived with his step-mother following the transfer he made any inquiry from her about the telephone stock he said:

> "Why, she told us she transferred it. At the time that transfer was made I stressed the point she should transfer it in some way it would be earmarked, although I supposed she did; she didn't say anything about it.
>
> * * * * *
>
> Q. What inquiry did you make of her as to whether that stock was transferred to her outright or to her for life? A. I didn't make any.
>
> Q. Did you ask to see the certificates? A. I did not.

Q. Did you ever hear about the certificates of the American Telephone & Telegraph stock, from 1927 to 1934? A. Yes.

Q. When? A. In 1930.

Q. Tell us about it, where were you? A. I was married and went on my honeymoon, went down to Boston. After I was there a while, my sister-in-law, or rather my aunt, Helen Spittler, mentioned to me about that Grace had suffered great losses in the stock market, and she thought some of our securities were gone, and so while I was there I asked Grace about it and I demanded to see the certificates and she refused to show them to me.

Q. What did you do about it after she refused to show them to you? A. I was a guest in her home, I didn't say anything more about it, until shortly after I left, I investigated." (R. 30.)

Helen Spittler and Grace C. West were sisters then living together in Boston. From his further testimony it developed that what he investigated in 1930 was not the stock of the Telephone Company but of another company and that until March, 1934, he addressed no inquiries of any kind to the Telephone Company.

Also in 1930 he investigated the Cuyahoga County Probate Court records but did it so carelessly that, he says, while he saw the application for distribution he did not see the order of distribution (R. 32).

But the definite warning that his securities were gone in 1930 was not the only warning that he had that some at least of the stocks of the estate had been transferred to Grace C. West without limitation. Included in the same order of distribution with the telephone stock were 32 shares of the preferred stock of The M. A. Hanna Company. In the fall of 1928 Grace C. West delivered certificates for 16 shares of the Hanna stock to each of the plaintiffs, a transfer she could only have made if she had theretofore had complete title in her name. Maurice J. West testified that it did "seem strange" to him that she could

transfer the Hanna stock to him outright (R. 29) but he made no inquiry about it or about the Telephone Company stock.

Grace C. West did not pledge the telephone stock with her broker until October 31, 1929 (R. 47). Had the plaintiffs in the nearly 3-year period from February 2, 1927 to October 31, 1929, spent the price of a postage stamp on a letter to the Telephone Company, or investigated the Probate Court records of Cuyahoga County with any care, they could have discovered all that they learned in March, 1934, and in time to have prevented any wrong by anyone. The plaintiffs' loss is due solely to their own lack of diligence.

We suggest that the conclusion of the Circuit Court of Appeals on these undisputed facts is sound:

> "Laches also exists and is fatal to recovery. A material consideration in this connection is the fact that the action is brought not against the life tenant, the principal tort feasor, but against the defendant, whose wrongdoing constitutes mere negligence, no concealment or fraud being charged. The family relationship might perhaps account for delay in making demand if the action were against the life tenant herself. But this relationship also suggests strong possibility of collusion, and does not excuse delay as to this defendant. Maurice John West's knowledge in 1930 that some of these stocks had been sold called for action. If inquiry had then been made, the defendant might have been able to enforce its remedy against the life tenant. Laches is not measured by the statute of limitations (*Alsop v. Riker,* 155 U. S. 448). But here the delay is longer than the period of the statute, and compels the conclusion that the plaintiffs failed within a reasonable time to assert their rights. Cf. *Liverpool & London & Globe Ins. Co. v. Crosby,* 83 Fed. (2d) 647 (C. C. A. 6)." (R. 142-3.)

IV.

THE PRESENT ACTION IS BARRED BY THE FINAL JUDGMENT OF THE OHIO COURT OF APPEALS.

The defendant pleaded fully and proved an adjudication in its favor by final judgment on the merits in the state courts. The parties, the pleadings, the issues and the evidence are all precisely the same in the two cases except for the immaterial allegations and proof as to a demand. As we later show demand was not necessary by the settled law of Ohio. The only statement to the contrary appears in the unfiled opinion of the Court of Appeals in the former case. Even if demand were necessary, the cause of action alleged and relied on in both cases was the transfer of 1927.

That the judgment was a final judgment on the merits admits of no doubt. It declared that:

> "* * * the judgment of the said Court of Common Pleas is reversed for reasons stated in opinion on file and final judgment is hereby rendered for appellant (defendant), * * *." (R. 114.)

That is the ordinary form of a final judgment on the merits. It was this *judgment* which the Supreme Court of Ohio refused to review, for, of course, it does not review opinions.

This judgment is unambiguous. It cannot be modified or changed by anything said in the Court's opinion whether that opinion is filed or unfiled.

As this Court has said in *Rogers v. Hill*, 289 U. S. 582 at 587 (1933), "The court's decision of a case is its *judgment* thereon. Its opinion is a statement of the reasons on which the judgment rests."

What the plaintiffs seek to do is to use the unfiled *opinion* of the Ohio Court of Appeals to show that when that Court entered final judgment for the defendant it did not mean to do so; that what it meant to do was to order the dismissal of the petition without prejudice because it was prematurely brought. The latter would have been the

proper order for the Court of Appeals to have made had it intended its judgment to reflect the views the plaintiffs claim it entertained. The plaintiffs thus seek to convert an unambiguous final judgment into a judgment of dismissal without prejudice although they gave the Ohio Court of Appeals no opportunity by a timely motion to decide whether it intended to do this or not.

The reasons why courts will not modify judgments in accordance with the views of the parties as to the meaning of opinions was never better stated than by Mr. Justice Day in *Deposit Bank v. Frankfort,* 191 U. S. 499 (1903), when he said, page 510:

> "When a plea of *res judicata* is interposed based upon a former judgment between the parties, the question is not what were the reasons upon which the judgment proceeded, but what was the judgment itself, was it within the jurisdiction of the court, between the same parties, and is it still in force and effect? The doctrine of estoppel by judgment is founded upon the proposition that all controversies and contentions involved are set at rest by a judgment or decree lawfully rendered which in its terms embodied a settlement of the rights of the parties. It would undermine the foundation of the principle upon which it is based if the court might inquire into and revise the reasons which led the court to make the judgment. In such case, nothing would be set at rest by the decree; but the matter supposed to be finally adjudicated, and concerning which the parties had had their day in court, could be reopened and examined, and if the reasons stated were in the judgment of the court before which the estoppel is pleaded insufficient, a new judgment could be rendered because of these divergent views and the whole matter would be at large. In other words, nothing would be settled, and the judgment, unreversed, instead of having the effect of forever settling the rights of the parties, would be but an idle ceremony. We are unable to find reason or authority supporting the proposition that because a judgment may have been given for wrong reasons or has been

subsequently reversed, that it is any the less effective as an estoppel between the parties while in force."

The cases in Ohio are in entire accord with the federal rule. In *Kehm v. Insurance Company*, 11 O. C. C. (N. S.) 1 (1908), affirmed without opinion in 81 O. S. 563, a demurrer to the plaintiff's petition was sustained in the Court of Common Pleas and this order affirmed in the Circuit Court. When plaintiff brought a new action in the Court of Common Pleas the defendant pleaded the former judgment which was held by all the courts to be a bar although the opinion of the Circuit Court in the first case showed that it proceeded on a technical ground, namely, no consideration alleged in the petition.

The Circuit Court in the second case said at page 3:

> "The general principles of the law applicable to the question at bar seem to be well settled. If no error had been prosecuted to the judgment of the court of common pleas, the judgment of that court on the demurrer would be final and a bar to this action. This judgment was affirmed by the circuit court, and we think the finality of the judgment was not changed by the fact that looking to the opinion of the court, outside of the record of that case, the circuit court based its affirmation on technical grounds. The circuit court might have been wrong in its conclusion and still the judgment have been right, and if the case had gone to the supreme court the question there would have been, not whether the reasons given by the circuit court in its opinion were right, but whether on the record the judgment of affirmance was right. We think the judgment should be affirmed."

In view of these well settled principles the most that the plaintiffs can claim here, assuming that they are even entitled to refer to the unfiled opinion of the Ohio Court of Appeals, is that its judgment was erroneous on its own view of the law. It is a well settled part of the doctrine of *res judicata* that the fact that a judgment in the state

court between the same parties on the same cause is erroneous does not prevent its effectiveness as a bar to further litigation in the federal court. In *Rooker v. Fidelity Trust Company,* 263 U. S. 413 (1923), Mr. Justice Van Devanter said with reference to a state judgment, page 415:

> "If the decision was wrong, that did not make the judgment void, but merely left it open to reversal or modification in an appropriate and timely appellate proceeding. Unless and until so reversed or modified, it would be an effective and conclusive adjudication. *Elliott v. Peirsol,* 1 Pet. 328, 340; *Thompson v. Tolmie,* 2 Pet. 157, 169; *Voorhees v. Bank of United States,* 10 Pet. 449, 474; *Cornett v. Williams,* 20 Wall. 226, 249; *Ex parte Harding,* 120 U. S. 782."

More recently, in *Reed v. Allen,* 286 U. S. 191 (1932), a case of great hardship, Mr. Justice Sutherland said, at page 201:

> "These decisions constitute applications of the general and well settled rule that a judgment, not set aside on appeal or otherwise, is equally effective as an estoppel upon the points decided, whether the decision be right or wrong. *Cornett v. Williams,* 20 Wall. 226, 249-250; *Wilson's Executor v. Deen,* 121 U. S. 525, 534; *Chicago, R. I. & P. Ry. v. Schendel,* 270 U. S. 611, 617. The indulgence of a contrary view would result in creating elements of uncertainty and confusion and in undermining the conclusive character of judgments, consequences which it was the very purpose of the doctrine of *res judicata* to avert."

Plainly the judgment rendered in the state court is a bar to the present action. On this point the Circuit Court of Appeals below did not pass, saying—

> "As plaintiffs' bill was not timely filed, it is unnecessary to consider the question of *res judicata,* also relied upon by defendant." (R. 143.)

V.

THE QUESTION OF THE APPLICABILITY OF ERIE RAILROAD v. TOMPKINS.

The Circuit Court of Appeals discussed the rule of *Erie Railroad v. Tompkins* as an alternative basis for refuting plaintiffs' argument on the statute of limitations. That is, it said that since it was not required to follow the opinion of the Ohio Court of Appeals that a demand was necessary, it would hold that a demand was not necessary and that the cause of action arose in 1927 and was barred by the statute of limitations. Alternatively it held, as we have seen, that the same thing would be true if it had held that a demand were necessary.

The plaintiffs, however, go much further. They seek to avoid not only the defense of the statute of limitations but the defenses of laches and *res adjudicata* on the ground that the federal courts are bound to follow the decision of the Ohio Court of Appeals; that under this decision no cause of action arose until a demand was made and refused in 1937, and that the cause of action which then arose was a different one from that decided by the Ohio Court of Appeals.

Before any discussion of the rule of *Erie Railroad v. Tompkins* and its applicability here it is necessary to state (1) the settled law of Ohio as to the necessity of a demand as it stood prior to the opinion of the Ohio Court of Appeals, and (2) the misapplication of well settled Ohio law in the opinion of the Ohio Court of Appeals.

A. The Settled Law of Ohio as to Demand Prior to the Decision of the Ohio Court of Appeals.

The plaintiffs sue for a destruction of their remainder while the life tenant is alive. As remaindermen the plaintiffs have no right to a certificate of stock or to dividends or to voting rights. If they have no right to these things, obviously they have no right to demand any of these things.

It follows that if their rights of future enjoyment were destroyed, as they claim, by the acts of the defendant in 1927 and 1929 they had a right to bring an immediate action for that purpose without any demand. In the following cases cited in the plaintiffs' brief, all but one of which are for the negligent transfer of stock, no demand preceded the filing of the petition. *Coffey v. Wilkerson,* 58 Ky. 101 (1858) (Plaintiffs' brief, p. 30); *Yeager v. Bank,* 127 Ky. 751 (1908) (Plaintiffs' brief, p. 31); *Allen v. The Insurance Company,* 10 Oh. Dec. Repr. 204 (1894) (affirmed without opinion, 52 O. S. 622) (Plaintiffs' brief, pp. 31, 42, 43); *Loring v. Salisburg Mills,* 125 Mass. 138 (1878) (Plaintiffs' brief, p. 36); *Lowry v. Bank,* Fed. Cases No. 8,581 (1848) (Plaintiffs' brief, pp. 38, 40); *Baker v. Atlantic Coast Line Railroad,* 173 N. E. 365 (1917) (Plaintiffs' brief, pp. 22, 39). These cases recognize that where a plaintiff's remainder in stock has been destroyed by a corporation's negligence in permitting a fiduciary to improperly dispose of the stock the plaintiff may immediately bring suit for the destruction of his remainder.

The cases on this point that have heretofore been decided by the Supreme Court of Ohio are cases between a stockholder and a corporation. The leading case is *Cleveland & Mahoning Railroad Company v. Robbins,* 35 O. S. 483 (1880). Here a stockholder of the Railroad Company sold his shares and delivered the endorsed certificate to the purchaser. The purchaser mislaid it for many years and never had it transferred to his name on the books of the company. Thus the corporation did not know he was a stockholder. In the meantime the record holder of the shares represented to the corporation that he had lost his certificate and by giving bond secured a duplicate certificate upon which dividends were subsequently declared and paid. After the death of the original purchaser his executor found his old certificate duly endorsed by the original record holder and made demand upon the corporation to issue a new certificate and account for dividends pre-

viously paid to others. This demand was refused, suit was brought and the corporation pleaded among other things the statute of limitations. The Court held that under such circumstances the corporation was without fault and had committed no wrong until it received notice, through a demand, of the rights of the original purchaser whose rights were not disclosed by its records. It held that until the corporation refused to transfer the shares upon presentation of the old certificate it had committed no wrong and no cause of action arose; that the statute of limitations did not begin to run until demand was refused, and that the corporation was not liable for dividends paid before it knew of the purchaser's interest.

This same principle has been applied in Ohio to similar situations in the following cases: *Steverding v. Cleveland Co-operative Stove Company,* 121 O. S. 250 (1929); *Pure Oil Company v. Hunt,* 40 O. App. 329 (1931); *American Steel Foundries v. Hunt,* 79 Fed. (2d) 558 (C. C. A. 6, 1935).

The principle of these decisions is that the purchaser and assignee of corporate stock is the owner thereof even though the corporation does not know of his ownership but that the corporation commits no actionable wrong against him by treating the record owner as the stockholder until the real owner has advised the corporation of his rights by a demand either to transfer his stock or pay him dividends or accord him voting rights. The refusal of the demand is the first wrongful act.

The plain implication of these decisions is that where the corporation has full notice of the rights of stockholder or remaindermen and injures or destroys those rights by the negligent act of its agents no demand is necessary to the cause of action. The claim here is that the corporation was fully advised of the plaintiffs' rights in 1927 through a copy of the will of their father and other documents. If the defendant committed any wrong it was committed when it made the transfer, as the plaintiffs claim.

The refusal of the demand added nothing to the cause of action nor is it the cause of action alleged.

In the *American Steel Foundries* case, *supra,* a case from Ohio, Judge Hicks in his opinion mentioned three classes of cases for the conversion of stock in the first two of which no demand was necessary and in the third of which, cases of the type of the *Robbins* case, *supra,* he held a demand to be necessary. At 79 F. (2) page 561 he said:

> "There are of course many circumstances under which trover will lie for the conversion of corporate shares such as (1) where a transfer upon the books passes title by virtue of the by-laws or regulations of the company or of some particular statute (*Cornick v. Richards,* 3 Lea (Tenn.) 1; *Leurey v. Bank of Baton Rouge,* 131 La. 30, 38, 58 So. 1022, Ann. Cas. 1913E, 1168); (2) where the transfer was brought about by the negligence of corporate agents; and (3) where the corporation by some overt or positive act and in violation of its trusteeship repudiated the shareholder's ownership and acted in hostility thereto. The third class is illustrated by *Cleveland & M. R. Co. v. Robbins, Adm'r.,* 35 Ohio St. 483, where after the issuance of the replacement certificates there was a demand by the rightful owner of the shares for the restoration of his rights followed by a specific denial. See, also, *First Nat. Bank v. Lanier,* 11 Wall. 369, 20 L. Ed. 172; *MacDonnell v. Buffalo Loan, Trust & Safe Dep. Co.,* 193 N. Y. 92, 85 N. E. 801. Here there was neither allegation nor evidence of demand and refusal, nor evidence of any positive repudiation of appellee's ownership. See *Pure Oil Co. v. Hunt,* 46 Ohio App. 329, 188 N. E. 738."

Both by decisions of the Supreme Court of Ohio and of the United States Circuit Court of Appeals for the Sixth Circuit applying Ohio law the settled rule was that a demand was not necessary in an action for conversion of corporate stock through the negligent act of corporate agents in making a transfer but was only necessary where the corporation committed no wrong against the stock-

holder until it refused his proper demand. The law of Ohio is thus settled by the decisions of its highest court and under *Erie Railroad v. Tompkins* no reference to lower court decisions is necessary or proper.

B. The Opinion of the Ohio Court of Appeals is a Misapplication of Well Settled Ohio Law.

The plaintiffs' first suit was filed in 1934 in the Common Pleas Court of Cuyahoga County. It was a law action seeking damages on account of the alleged wrongful transfers effected in 1927 and 1929. A jury having been waived the Common Pleas Court entered judgment for the plaintiffs for the full amount of their claim.

The defendant prosecuted error to the Court of Appeals whose territorial jurisdiction is coextensive with Cuyahoga County. That court, after hearing, entered final judgment declaring that:

> "the judgment of the said Court of Common Pleas is reversed for reasons stated in opinion on file and final judgment is hereby rendered for appellant (defendant)." (R. 114.)
>
> Actually, "no opinion of the Court of Appeals was filed with the record of said cause, although copies of such an opinion were furnished by the Court to counsel of record." (R. 113.)

In this unfiled opinion (R. 71 *et seq.*) the court said (1) that the defendant had made a negligent transfer, (2) that there was no estoppel against the plaintiffs, (3) that the conveyance of absolute ownership in the stock by the life tenant in 1929 did not forfeit her life estate to the remaindermen, and (4) that the plaintiffs could not maintain this action because no demand on the defendant had been made.

In support of its holding that a demand in this case was necessary, a question that had neither been briefed nor argued by counsel on either side, the Ohio Court of Appeals relied principally on the Ohio cases of *Railway Company v.*

Robbins, supra, Pure Oil Company v. Hunt, Receiver, supra, and *American Steel Foundries v. Hunt, supra.*

The opinion of the Ohio Court of Appeals which is now claimed to be binding upon the federal courts thus took a perfectly well settled proposition of Ohio law and applied it to a situation in which it has never been applied in this state and to which, on the theory of the leading cases, it is not applicable. It is plainly a misconception of the settled decisions of Ohio and specifically, as Judge Allen held, of a former decision of the Sixth Circuit Court of Appeals applying Ohio law. By insisting upon the applicability of *Erie Railroad v. Tompkins* the plaintiffs seek to fasten upon the law of Ohio a complete misconstruction by one Ohio Court of Appeals of a principle upon which the highest court of the state and all other courts have been agreed for a long time. As Judge Allen pointed out (R. 140):

> "If the judgment of the state court of appeals is binding here, we have the anomalous situation of an intermediate appellate court in Ohio misconstruing a decision of this court (*American Steel Foundries v. Hunt, supra*), and a District Court upon authority of the inferior appellate court's misconstruction, making the same error, and this court following the same erroneous holding."

Judge Allen might have added that this opinion was also a misconstruction of the *Robbins* case and other Ohio Supreme Court decisions.

The statement in the plaintiffs' brief, page 17, that the refusal of the Ohio Supreme Court to grant the plaintiffs' motion to certify this case for its decision "is in some degree an approval of the decision" of the Ohio Court of Appeals is wholly unwarranted if by that it is meant an approval of the opinion. The Supreme Court, of course, reviews a judgment and not the reasons for a judgment expressed in an opinion. In this case it found a judgment in favor of the defendant and if there is any inference of approval to be drawn from denial of the motion to certify it is

that the judgment was right either because the defendant was not guilty of negligence or because the action was barred by the statute of limitations, or other reason.

C. The Opinion of the Ohio Court of Appeals is Not Binding on the Federal Courts.

We are now in a position to summarize the many reasons why the opinion of the Ohio Court of Appeals in this case should not be considered binding on the federal courts.

1. The rule of Erie Railroad v. Tompkins and other decisions of this Court is that the law of a state must be established by its Legislature or by its highest court.

In *Erie Railroad Company v. Tompkins,* 304 U. S. 64 (1938), at page 78, in *Lyons v. Mutual Benefit Health & Accident Association,* 305 U. S. 484 (1939), at pages 489-490, and in *Wichita Royalty Company v. City National Bank of Wichita Falls,* 306 U. S. 103 (1939), at page 107, this Court held it to be the duty of the Federal Court to apply the law of the state as declared by its "highest court."

In *Russell v. Todd,* 309 U. S. 280 (1940), at page 293, Mr. Justice Stone said:

> "In the absence of a definitive ruling by the highest court of the state, we accept the decision of the Appellate Division and the reasoning of the Court of Appeals upon which it rests as persuasive * * *."

These cases establish the rule of binding authority for the decisions of the highest court of a state and a persuasive authority only for the decisions of inferior state courts.

This has been the interpretation of the decisions of this Court not only by the Sixth Circuit in the instant case but by other Circuits. *Six Companies v. Joint Highway District No. 13 of California,* 110 Fed. (2d) 620 (C. C. A. 9, 1940); *Field v. Fidelity Union Trust Company,* 108 Fed.

(2d) 521 (C. C. A, 3, 1939) (lower court decisions not binding and not followed); *Hack v. American Surety Company,* 96 Fed. (2d) 939 (C. C. A. 7, 1938) (lower court decision persuasive and followed).

Prior to the decision in *Erie Railroad v. Tompkins,* when the Rules of Decision Act was interpreted as not applying to matters of general common law, the same situation prevailed. One of the most important cases in this period was *Erie Railroad v. Hilt,* 247 U. S. 97 (1918). The critical part of the opinion is the following statement of Mr. Justice Holmes, referring to the New Jersey Supreme Court:

> "In view of the importance of that tribunal in New Jersey, although not the highest Court in the State, we see no reason why it should not be followed by the Courts of the United States, even if we thought its decisions more doubtful than we do." (p. 99.)

The balance of the opinion shows that Mr. Justice Holmes approved of the decision of the New Jersey court. The statement above quoted demonstrates only that even if he had not fully approved of it he would have followed it in the interest of harmony and comity. Justice Holmes certainly does not say he would have followed the state court decision even though he found it erroneous.

The decision in *Graham v. White-Phillips Co.,* 296 U. S. 27 (1935), clearly held that the decision of an intermediate Appellate Court in Illinois construing the Negotiable Instrument Law was not binding upon the federal court sitting in Illinois. Mr. Justice McReynolds said at p. 30:

> "Petitioner insists, that under the authoritative construction placed upon the Illinois Negotiable Instrument Law by her Supreme Court, since respondent had received information of the defective title, there was bad faith as matter of law, and no title passed. He strongly relies upon *Northwestern National Bank v. Madison & Kedzie State Bank,* 242 Ill. App. 22, and the denial of certiorari therein.

"Under *Burns Mortgage Co. v. Fried,* 292 U. S. 487, a definite construction of the negotiable instrument law by the State Supreme Court, binding upon the local tribunals, must be accepted by the federal courts. But we cannot think that the ruling and action in the *Northwestern Bank* case amount to such a construction. That cause, decided by the Appellate Court, First Division, October, 1926, involved title to stolen bonds held by one claiming as a bona fide purchaser, after receipt of notice of the theft. The court there said: 'The notice having been received by the proper agent of the bank to receive, open and acknowledge its mail in the line of his duties, we think the bank is estopped from claiming that it did not have actual knowledge of the defect in the title to the bonds it subsequently received.' The State Supreme Court denied an application for certiorari without more. The argument is that this amounted to approval of the construction placed upon the statute by the Appellate Court. The point is not well taken.

"*National Bank v. Uptown State Bank,* 273 Ill. App. 401, (1934) construed the statute differently, and made no reference to the earlier case. We cannot know upon what ground certiorari was denied. The Illinois Supreme Court has declared that 'Whether one has notice of a certain fact is a question of fact and not of law'; *Paine v. Sheridan Trust & Savings Bank,* 342 Ill. 342, 348; 174 N. E. 368; also that denial of certiorari does not import approval of the reasons assigned by the lower court. *People ex rel. Hoyne v. Grant,* 283 Ill. 391, 397; 119 N. E. 344.

"The Appellate Courts in Illinois are inferior tribunals and a statute provided that their opinions 'shall not be binding authority in any case or proceeding other than that in which they may be filed.' *Illinois Constitution,* 1870; Article VI, § 11; *Cahill's Illinois Rev. Stats.* 1933, c. 37, par. 49.

"*No authoritative construction of the negotiable instrument law of Illinois supports petitioner's position. And the court below rightly undertook to determine for itself the meaning and effect of the pertinent sections.*" (Italics supplied.)

2. Even if the rule of Erie Railroad v. Tompkins were to be extended it ought not to include decisions by the Courts of Appeals of Ohio.

There are nine Courts of Appeals in Ohio, each having jurisdiction in a particular district. The Eighth District has jurisdiction in only a single county, namely, Cuyahoga. It has no jurisdiction over suits brought in the other eighty-seven counties of the state. Its judgments are final except in cases involving questions under the State or Federal Constitution and "cases of public or great general interest in which the supreme court may direct any court of appeals to certify its record to that court." Ohio Constitution, Article IV, Section 6. In practice this means that the Supreme Court can, by granting a motion to certify, review practically any case decided by any Court of Appeals.

The decisions of the Court of Appeals of Cuyahoga County are not binding upon the courts of the other eighty-seven counties of Ohio but are of persuasive authority only. Common Pleas judges of the other 87 counties and the Courts of Appeals of the other eight districts are under no obligation to accord the opinion in *West v. American Telephone and Telegraph Company* any greater weight than its reasoning compels. Nor does the fact that a motion to certify this decision was denied by the Ohio Supreme Court add to its authority. *Village of Brewster v. Hill,* 120 O. S. 343 (1929). As Judge Allen, formerly a judge of the Supreme Court of Ohio, said in the present case:

> "The settled rule in Ohio is that the Supreme Court, by denial of motion to certify the record, lays down no law." (R. 140.)

The only Ohio court, therefore, that is bound by the decision of the Court of Appeals of Cuyahoga County is the Common Pleas Court of that county. If the plaintiffs' claim in this case is recognized it will mean that the decision of the Ohio Court of Appeals of Cuyahoga County can be ignored by the courts of eighty-seven of eighty-eight

counties in Ohio, as it can by the Supreme Court of Ohio, but will be binding upon justices of the peace, municipal courts and the Common Pleas Court of Cuyahoga County and upon all the federal courts, including the highest.

Moreover, it means that a plain misinterpretation and misconstruction of the decisions of the Supreme Court of Ohio incorporated in the opinion in this case can be corrected in a later case in practically all the courts of Ohio but cannot be corrected by any of the federal courts.

Finally, it means, as the Circuit Court of Appeals said, that a decision proceeding upon a misunderstanding of a former decision of the Sixth Circuit Court of Appeals cannot be corrected by that court or by this Court.

There are other consequences of moment implicit in the acceptance of the plaintiffs' views. Prior to *Erie Railroad v. Tompkins* it was customary for parties who benefited by the rule in federal courts differing from the rule applied in state courts of their jurisdiction to sue in the former for the very purpose of avoiding state law. To stop this was one of the principal reasons for the rule of *Erie Railroad v. Tompkins*. If the rule sought by the plaintiffs were put in effect every cause of action supported by a doubtful decision of a Court of Appeals of Ohio would be brought in the federal court where diversity or other jurisdictional ground existed for the very purpose of preventing the Ohio courts from correcting the unsound rule. In such cases the parties claiming the benefit of the rule could feel confident under such a doctrine that even this Court could not change the rule although most of the courts of their own state might. In this case it is proper to ask why these plaintiffs did not bring their second suit in the state courts as they did the first.

We point out further that the District Court for the Eastern Division of the Northern District of Ohio has jurisdiction in some nineteen counties. These same nineteen counties include all or parts of the territorial jurisdic-

tion of three Ohio Courts of Appeals. Under the rule advocated by the petitioners a single judge sitting in the Eastern Division of the Northern District of Ohio might conceivably have three different rules of law from which to choose as announced by the three Ohio Courts of Appeals in his district. And why stop here? If each Court of Appeals in Ohio can declare the law of the state binding on the federal court theoretically there could be nine such decisions from which the District Judge might choose. To this tangle there would be no solution except the adoption of rules of conflict of laws to be applied to the decisions of the various Courts of Appeals. We suggest that the complexities arising out of the interrelation of the state and federal sovereignties are great enough as it is without multiplying them many fold by giving to decisions of the Ohio Courts of Appeals an effect wholly beyond any accorded them in the State of Ohio.

Certainly nothing heretofore decided by this Court warrants the claim here made that while a Justice of the Peace in Youngstown, Ohio, is free to make an independent examination and apply a rule of law at variance to one announced by the Court of Appeals of Cuyahoga County, neither the United States District Court nor the United States Circuit Court of Appeals nor the Supreme Court of the United States may do so.

Nothing herein said is intended to reduce the persuasive authority of the sound decisions of the lower courts of Ohio. It is recognized that not infrequently the most complete and thorough consideration of a legal question is found in the opinion of an inferior court. Both the judiciary and the bar have always accorded to such decisions the weight to which their merits entitle them.

If the rule be that the state law is to be found either in the statutes or decisions of the highest court of the state the federal courts can still give to the decisions of lower courts all of the effect to which their merits entitle them.

3. The opinion of the Ohio Court of Appeals in this case cannot be accepted by the federal courts without (a) denying full faith and credit to the judgment rendered in the same case and (b) perpetuating a plain misconstruction of well settled Ohio law.

We have already pointed out that the judgment of the Ohio Court of Appeals was a judgment on the merits in favor of the defendant and that such a judgment is inconsistent with the plaintiffs' interpretation of the unfiled opinion of that court.

The full faith and credit clause of the Federal Constitution, applicable only to the state courts, has been extended by statute to the federal courts. The rule has been recently stated in *Davis v. Davis,* 305 U. S. 32 (1939), by Mr. Justice Butler as follows:

> "Art. IV, § 1, requires that judicial proceedings in each State shall be given full faith and credit in the courts of every other state. The Act of May 26, 1790, 1 Stat. 122, as amended, R. S. § 905, 28 U. S. C. § 687, declares that judicial proceedings authenticated as there provided shall have such faith and credit given to them in every 'court within the United States as they have by law or usage in the courts of the State from which they are taken.' Thus Congress rightly interpreted the clause to mean, not some, but full credit. *Haddock v. Haddock, supra,* 567. The Act extended the rule of the Constitution to all courts, federal as well as state. *Mills v. Duryee,* 7 Cr. 481, 485." (p. 39.)

It follows that if the rule of *Erie Railroad v. Tompkins* requires the federal courts in this case to accept the unfiled opinion of the Ohio Court of Appeals as correctly stating the settled law of the state it will by so doing, at the same time, deny full faith and credit to the judgment of the Ohio Court of Appeals in that same case. As previously noted it will perpetuate a misapplication of well settled decisions of the Ohio Supreme Court.

That this judgment itself is a bar and a complete defense in this action is elsewhere argued in this brief.

VI.

PLAINTIFFS' CLAIMS AS TO THE RELIEF ARE WHOLLY UNWARRANTED.

While this case can be fully diposed of on preceding points, professional duty probably requires that a word be said about the claims on pages 29 to 47 of the plaintiffs' brief as to the relief and damages to which the plaintiffs believe themselves entitled.

The District Judge entered a decree directing the defendant to deposit 92 shares of its common stock in trust, the dividends to be paid to the defendant during the life of Grace C. West and the stock at her death to be distributed to the plaintiffs in accordance with the will (R. 125). This decree would have given the plaintiffs exactly what their father's will provided.

But the plaintiffs are not satisfied with this. They ask that they be given 92 shares immediately and that in addition they be awarded dividends and damages, plus interest, in an amount which, if invested in the defendant's stock at the time of trial, would give the plaintiffs about 160 shares more. Thus they seek the assistance of equity to secure the immediate enjoyment of more than 250 shares of common stock in lieu of the remainder of 92 shares which their father left them.

The theory upon which these extravagant claims are based is that if a life tenant in whose name corporate stock stands sells it and assigns the complete interest he thereby forfeits the life estate and the remainder is immediately accelerated.

There are several short answers to this claim as follows:

1. The doctrine of forfeiture of a life estate because of a tortious conveyance was a doctrine of feudal law applicable only to real estate and then only to conveyances by livery of seisin. *Greenleaf's Cruise on Real Property,* Vol. 1, pages 108-9.

In *Carpenter v. Denoon,* 29 O. S. 379 (1876), at page 398 the Supreme Court of Ohio said:

> "This doctrine of the common law, which had its origin and reason in the feudal system, has never, as far as we know, been recognized in this state, nor do we think there is any good reason for maintaining it under our system. 4 *Kent Com.* 83, 84; 3 Dallas, 486; 1 B. Mon. 88; 11 Conn. 553; 40 Maine, 528."

The plaintiffs rely upon New York and Massachusetts cases which are in no sense illustrations of the doctrine. In both of those states remnants of the doctrine as applied to real estate were abolished by statute at an early date. *Laws of Massachusetts,* Chapter 184, Section 9; *New York Real Property Law,* Section 247. Similar statutes as to personal property were not necessary since the doctrine was never applied to personal property even in England.

The Massachusetts cases cited by the plaintiffs (Brief p. 30) are cases of ordinary common law waste. The Kentucky cases cited by the plaintiffs (Brief pp. 30-31) were both cases where suit was brought by a remainderman after the death of the life tenant and no question of forfeiture of a life estate was or could be involved. The Ohio Common Pleas decision cited (Brief p. 31) is fully distinguished in the opinion of the District Court (R. 119-20).

2. What the plaintiffs ask the court of equity to do by their present claims is to enforce a forfeiture. Usually equity is asked to and does *relieve* from forfeiture.

The most frequently quoted statement as to the attitude of equity toward a forfeiture is that of Mr. Justice Swayne in *Marshall v. Vicksburg,* 15 Wall. 146 (1872), when he said at page 149:

> "Equity never, under any circumstances, lends its aid to enforce a forfeiture or penalty, or anything in the nature of either."

3. If the doctrine of *Erie Railroad v. Tompkins* requires this Court to follow the opinion of the Ohio Court of

Appeals, as the plaintiffs claim, that opinion holds that there was in this case no forfeiture of the life estate (R. 75). The District Court likewise examined the claims as to forfeiture and rejected them (R. 119-20). The Circuit Court of Appeals did not find it necessary to consider them (R. 143).

CONCLUSION.

The judgment of the Circuit Court of Appeals should be affirmed for each of the following independent reasons: (a) because the defendant was guilty of no wrong, (b) because the action is barred by the statute of limitations, (c) because the action is barred by laches, and (d) because the judgment of the Ohio Court of Appeals in favor of the defendant is *res adjudicata*. The question whether a decision of an Ohio Court of Appeals is a determination of state law binding upon the federal courts is not, we submit, necessarily involved in this case, but if it is to be decided, the rule should be that such a decision is not binding.

Respectfully submitted,

WILLIAM B. COCKLEY,

Attorney for the American Telephone & Telegraph Company.

pp. 3, 5, 7

SUPREME COURT OF THE UNITED STATES.

Nos. 44, 45.—October Term, 1940.

Charles Peyton West and Maurice John West, Petitioners.
44 *vs.*
American Telephone and Telegraph Co.

Charles Peyton West and Maurice John West, Petitioners.
45 *vs.*
American Telephone and Telegraph Co.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[December 9, 1940.]

Mr. Justice Stone delivered the opinion of the Court.

The Circuit Court of Appeals in this case, in which jurisdiction rests exclusively on diversity of citizenship, declined to follow the ruling in *West* v. *American Telephone & Telegraph Co.*, 54 Ohio App. 369, 7 Ohio Opinions 363, of the Cuyahoga County Court of Appeals, an intermediate appellate court of Ohio. The question for decision is whether, in refusing to follow the rule of law announced by the state court, the court below failed to apply state law within the requirement of § 34 of the Judiciary Act of 1789 and of our decision in *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64.

In 1926 an Ohio decedent, domiciled at death in Cuyahoga County, bequeathed his estate, including ninety-two shares of the common stock of respondent, to his widow for life, with remainder to petitioners, the sons of decedent's first wife, who was the sister of his widow. February 2, 1927, the widow tendered to respondent, for transfer, certificates for the ninety-two shares of stock standing in decedent's name, each endorsed with an assignment of the shares evidenced by the certificate, to the widow, signed in her name as executrix of decedent's estate. Accompanying the certificate were duly attested documents as follows: A copy of decedent's will, a certificate of the Cuyahoga County Probate Court of the qualification of the widow as executrix under the will; copy of an applica-

tion of the executrix for the distribution in kind of the estate, consisting of specified corporate stocks including the ninety-two shares of respondent's stock, with the appended consent of petitioners to the distribution in kind, and a copy of the journal of the probate court showing that it had granted the application and ordered the distribution.

Thereupon respondent issued a new certificate for the ninety-two shares in the name of the widow which did not disclose her limited interest as life tenant or that of petitioners as remaindermen. October 31, 1929 the widow endorsed and delivered the certificate as collateral security for her brokerage account to a stock broker to whom respondent issued a new certificate in his name as stockholder on November 4, 1929. In March, 1934, petitioners first learned of this disposition of the shares by the widow and in June, 1934, brought suit against respondent in the Cuyahoga County Court of Common Pleas, seeking recovery of damages for the wrongful transfer of the shares. In addition to defenses on the merits respondent set up the Ohio four-year statute of limitations. After a trial on the merits the trial court gave judgment for petitioners, which the Cuyahoga County Court of Appeals reversed. The state Supreme Court denied petitioners' motion to require the court of appeals to certify its record to the Supreme Court for review because of "probable error" in the case, after which the Court of Common Pleas entered "final judgment against appellees [petitioners here] and in favor of appellant [respondent here]" upon the mandate of the Court of Appeals stating "the judgment of the Court of Common Pleas is reversed for reasons stated in opinion on file and final judgment is hereby rendered for appellant, no error appearing in the record." The opinion of the appellate court was not filed but copies were furnished counsel and it appears of record.

The state court of appeals held that upon the tender for transfer of the certificates of stock by the executrix it was the duty of respondent to issue a new certificate showing on its face the respective interests of the life tenant and of the petitioners as remaindermen; that the transfer of the shares by respondent to the broker without the endorsement of the certificate by petitioners was unauthorized and wrongful; that the unlawful disposition of the stock by the life tenant did not terminate the life interest or accelerate the rights of

the remaindermen, but that the refusal of respondent after demand by petitioner to recognize and reestablish petitioners' rights in the stock, or other stock of equal par value, was a conversion of it entitling petitioners to damages to the extent of the value of their interest in the stock or to a decree of restitution directing respondent to issue a new certificate for the ninety-two shares in such manner as would protect the respective interests of all parties.

Construing the relevant provisions of the Ohio Uniform Stock Transfer Act (Ohio G. C., §§ 8673-~~1.6.7.17.30~~) the court held that as a prerequisite to recovery for conversion of petitioners' interest in the stock it was necessary that respondent repudiate petitioners' title and that the petitioners should allege and prove that respondent had refused to recognize petitioners' right in the stock and to issue an appropriate certificate for it. As petitioner had failed to allege or prove any demand on respondent or any refusal by it in advance of suit to recognize petitioners' rights or to issue an appropriate certificate, the court directed judgment for respondent in conformity to its mandate.

On June 18, 1937, following the denial of petitioners' motion by the state Supreme Court, in January, 1937, petitioners made demand on respondent, the sufficiency of which is not questioned, to restore to petitioners their rights in the shares, and on July 14, 1937, petitioners brought the present suit in the federal district court for Northern Ohio. The bill of complaint, after alleging the facts already mentioned which the state court had found to establish the wrongful transfer of the stock by respondent and after reciting the course and results of the litigation in the state courts and the demand on respondent, set up petitioners' right to relief according to the decisions of the state courts and prayed judgment that respondent issue to petitioners a certificate for the ninety-two shares of stock and for back dividends with interest, and damages, and generally for other relief.

The trial court found that the cause of action did not accrue until the demand made upon respondent; that suit was not barred by the prior adjudication in the state court since that suit, in which no demand was alleged or proved, was on a different cause of action from that now asserted; that it was not barred by limitations or laches and that the remainder interests had not been accelerated by the wrongful disposition and transfer of the stock. It accordingly decreed

that respondent procure by purchase or otherwise ninety-two shares of its common stock, issue a certificate for it to a trustee, which was directed to hold the stock during the lifetime of the widow for the benefit of respondent and upon her death to make distribution of it to the remaindermen as directed by the will.

The Court of Appeals for the Sixth Circuit dismissed the appeal of petitioners raising questions not now material and on the appeal of the respondent, reversed the decree of the district court, 108 F. (2d) 347. It held contrary to the ruling of the state court that demand upon respondent was not prerequisite to the accrual of petitioners' cause of action and that petitioners' right of recovery was barred by limitations and laches. We granted certiorari, 310 U. S. 618, upon a petition which set up that the Court of Appeals had erroneously failed to apply the Ohio law with respect to the necessity for a demand as defined by the state court of appeals in the litigation between the present parties and that the court below had erroneously applied the Ohio rule of limitations and of laches, all questions of public importance concerning the interrelation of state and federal courts.

The court below thought that demand was not an essential part of the cause of action where the suit was brought by remaindermen not entitled to possession of the stock certificate, consequently that the district court had erred in following the ruling of the state court of appeals and that both had misconstrued and misapplied an earlier decision of the court below in *American Steel Foundries* v. *Hunt*, 79 F. (2d) 558, where demand was held to be prerequisite to a suit brought by one who had acquired shares by purchase but had failed to present the endorsed certificate to the corporation for transfer before bringing suit. It cited decisions of similar purport by the Ohio Supreme Court but recognized that the only Ohio case passing upon the question whether demand is prerequisite to suit in the case of a remainderman is the decision of the state court of appeals in *West* v. *American Telephone & Telegraph Co.*, *supra*. It held that it was not bound to follow the decision of an intermediate appellate court of the state and so was free to adopt and apply what it considered to be the better rule that demand is unnecessary and consequently is not a part of the petitioners' cause of action. From this it concluded that the cause of action which it thought had accrued in 1927 when the stock certificate was issued to the life tenant, was barred by the four-year statute of limitations

applicable to causes of action "for an injury to the rights of the plaintiff not arising on contract . . ." § 11224 Ohio G. C., or by laches if demand were necessary.

Since the equitable relief sought in this suit is predicated upon petitioners' legal rights growing out of respondent's unlawful transfer of the stock to the assignee of the life tenant, the state "laws" which, by § 34 of the Judiciary Act of 1789 c. 20, 28 U. S. C., § 725, are made "the rules of decision in trials at common law" define the nature and extent of petitioners' right. See *Russell* v. *Todd*, 309 U. S. 280, 289. And the rules of decision established by judicial decisions of state courts are "laws" as well as those prescribed by statute. *Erie Railroad Co.* v. *Tompkins, supra*, 78. True, as was intimated in the *Erie Railroad* case, the highest court of the state is the final arbiter of what is state law. When it has spoken, its pronouncement is to be accepted by federal courts as defining state law unless it has later given clear and persuasive indication that its pronouncement will be modified, limited or restricted. See *Wichita Royalty Co.* v. *City National Bank of Wichita Falls*, 306 U. S. 103, 107. But the obvious purpose of § 34 of the Judiciary Act is to avoid the maintenance within a state of two divergent or conflicting systems of law, one to be applied in the state courts, the other to be availed of in the federal courts, only in case of diversity of citizenship. That object would be thwarted if the federal courts were free to choose their own rules of decision whenever the highest court of the state has not spoken.

A state is not without law save as its highest court has declared it. There are many rules of decision commonly accepted and acted upon by the bar and inferior courts which are nevertheless laws of the state although the highest court of the state has never passed upon them. In those circumstances a federal court is not free to reject the state rule merely because it has not received the sanction of the highest state court, even though it thinks the rule is unsound in principle or that another is preferable. State law is to be applied in the federal as well as the state courts and it is the duty of the former in every case to ascertain from all the available data what the state law is and apply it rather than to prescribe a different rule, however superior it may appear from the viewpoint of "general law" and however much it may have departed from prior decisions of the federal courts. See *Erie Railroad Co.* v. *Tompkins, supra*, 78; *Russell* v. *Todd, supra*, 293.

the State rule

Where an intermediate appellate state court rests its considered judgment upon the rule of law which it announces, that is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise. *Six Companies of California* v. *Joint Highway District,* No. 267, decided this day; *Fidelity Union Trust Co.* v. *Field,* No. 32, decided this day: Cf. *Graham* v. *White-Phillips Co.,* 296 U. S. 27; *Wichita Royalty Co.* v. *City National Bank, supra,* 107; *Russell* v. *Todd, supra.* This is the more so where, as in this case, the highest court has refused to review the lower court's decision rendered in one phase of the very litigation which is now prosecuted by the same parties before the federal court. True, some other court of appeals of Ohio may in some other case arrive at a different conclusion and the Supreme Court of Ohio, notwithstanding its refusal to review the state decision against the petitioner may hold itself free to modify or reject the ruling thus announced. *Village of Brewster* v. *Hill,* 128 O. S. 343, 353.[1] Even though it is arguable that the Supreme Court of Ohio will at some later time modify the rule of the *West* case, whether that will ever happen remains a matter of conjecture. In the meantime the state law applicable to these parties and in this case has been authoritatively declared by the highest state court in which a decision could be had. If the present suit had been brought in the Cuyahoga county court no reason is advanced for supposing that the Cuyahoga court of appeals would depart from its previous ruling or that the Supreme Court of the state would grant the review which it withheld before. We think that the law thus announced and applied is the law of the state applicable in the same case and to the same parties in the federal court and that the federal court is not free to apply a different rule however desirable it may believe it to be, and even though it may think that the state Supreme Court may establish a different rule in some future litigation.

[1] Article IV, § 6 of the Ohio Constitution provides that: "Judgments of courts of appeal shall be final in all cases, except cases involving questions arising under the Constitution of the United States or of this state . . . , and cases of public or great general interest in which the supreme court may direct any court of appeals to certify its record to that court . . . and whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination."

Whether the state court of appeals in the first suit defined the cause of action as arising out of the failure of respondent to describe correctly the interests of the parties, in the certificate issued to the widow in 1927, or out of the wrongful transfer in 1929, is immaterial to the question of the period of limitation. In either case, since the cause of action under the Ohio law did not arise until demand which was either on June 2, 1934, when the suit was brought in the state court, or June 18, 1937, when the formal demand was made, the statute of limitations did not begin to run until one or the other of those dates. See *Keithler* v. *Foster*, 22 Ohio St. 27. It is unnecessary to decide whether, as petitioners contend, the suit was on contract or statutory liability to which the six-year statute applies, § 11222, Ohio G. C., or "for the recovery of personal property or for taking or detaining it," in which case the cause of action is not deemed to accrue "until the wrongdoer is discovered . . ." § 11224, Ohio G. C., see *Railroad Co.* v. *Robbins*, 35 Ohio St. 483, 502, or whether as the court below held the cause of action was "for injury to the rights of the plaintiff not arising on contract . . .", in which case the statute runs from the date of the injury when demand is not required. § 11224, Ohio G. C. For in any event since, under Ohio law no cause of action arose until demand was made, the four-year period would run either from the date of the first suit, or from that of the formal demand, and had not expired on July 14, 1937, when the present suit was commenced in the district court.

The court below also held that if demand were to be deemed a prerequisite to suit petitioners were barred by their "unnecessary delay" in making it, citing *Keithler* v. *Foster, supra*, for the proposition that demand must be made within four years after the cause arose (1927 or 1929), the time limited by the statute for bringing an action if no demand were necessary. But the Supreme Court in that case thought it correct to apply the rule relied upon by the circuit court of appeals only when "no cause for delay can be shown." Cf. *Stearns* v. *Hibben Dry Goods Co.*, 11 Ohio C. C. (N.S.) 553; affirmed 84 Ohio St. 470. Here no special circumstances are shown for limiting the time of demand or shortening the statutory period after demand.[2] Both the state court and

[2] In Keithler v. Foster, 22 Ohio St. 27, the demand on a sheriff for moneys collected on an execution sale in 1855 was not made until 1867. The Supreme Court in holding that the suit brought on the sheriff's bond in 1868 was not barred by the ten year statute of limitations said that where "the statute begins to run, in cases like this, from the time of demand, it would be but reasonable to hold, in the absence of other special circumstances, when no demand is

the district court in this case have ruled that petitioners are not estopped by their consent to distribution which both courts interpreted as a consent only to a lawful distribution by a lawful procedure. The district court also found that the evidence relied upon to show lack of diligence on the part of petitioners in prosecuting inquiries which would have disclosed the unlawful transfer failed of its purpose and was insufficient to establish either estoppel or laches. At most the evidence shows that in 1930 one of the petitioners became suspicious that the life tenant had suffered losses in the stock market and made inquiry of one corporation whose stock was included in the estate only to learn that the stock certificate had been properly issued to the widow as life tenant of the estate and that he made no further inquiries. The record is barren of any evidence to suggest that petitioners had any ground for suspicion that respondent had issued the certificate to the life tenant in any improper or unlawful form before March, 1934, when they discovered the misappropriation of the stock. They brought suit in the state court the following June. We think there was no want of diligence on the part of petitioners in presenting and prosecuting their demand and that the findings of the trial court are supported by the evidence and should not have been disturbed.

The judgment will be reversed, but as other points involving questions of state law argued here were not passed upon by the Court of Appeals the cause will be remanded to that court for further proceedings not inconsistent with this opinion.

Reversed.

---

shown to have been made within the statutory period for bringing the action, that, for the purpose of setting the statute in operation, a demand will be presumed at the expiration of that period, from which the statute will begin to run."

In Douglas *v.* Corry, 46 Ohio St. 349; Townsend *v.* Eichelberger, 51 Ohio St. 213, on which respondent relies, no suit was brought until after the expiration of the additional limitation period after the demand was made or presumed as in Keithler *v.* Foster, *supra*.

Here, even if demand were presumed at the end of a four year period, which began to run either in 1927 or 1929, the state court action was timely when begun on June 2, 1934. It was dismissed in February, 1937. The present action was begun in July, 1937. § 11233 of the Ohio G. C. provides: "In an action commenced, or attempted to be commenced, if in due time a judgment for the plaintiff be reversed, or if the plaintiff fails otherwise than upon the merits, and the time limited for the commencement of such action at the date of reversal or failure has expired, the plaintiff . . . may commence a new action within one year after such date. . . ."

SUPREME COURT OF THE UNITED STATES.

Nos. 44, 45.—October Term, 1940.

Charles Peyton West and Maurice John West, Petitioners,
44 *vs.*
American Telephone and Telegraph Co.

Charles Peyton West and Maurice John West, Petitioners,
45 *vs.*
American Telephone and Telegraph Co.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[December 9, 1940.]

Mr. Justice Roberts.

I concur in the opinion of the court in so far as it holds that the Circuit Court of Appeals should have treated the decision of the Cuyahoga County Court of Appeals, under the circumstances of this case, as expressing the law of Ohio with respect to the necessity of a demand prior to institution of suit. I do not, however, agree that the judgment should be reversed.

I am unable to say that the court below erred in holding that, under Ohio law, the four-year period of limitations applied to petitioners' cause of action, and that delay of demand for more than four years after the cause of action accrued barred the suit. Both holdings seem to me to be supported by decisions of the Ohio courts; *Keithler* v. *Foster,* 22 Oh. St. 27; *Douglas* v. *Corry,* 46 Oh. St. 349; *Townsend* v. *Eichelberger,* 51 Oh. St. 213; *Stearns* v. *Hibben Dry Goods Co.,* 11 Oh. C. C. (N. S.) 553, 31 Oh. C. C. 270; affirmed 84 Oh. St. 470. There is here no place for any presumption of demand, as in *Keithler* v. *Foster,* for here the suit in the state court was dismissed on the express ground that no demand had in fact been made; and in the present suit in the United States District Court the averment of the complaint is that demand was made June 18, 1937, at least eight years after the cause of action accrued. In such circumstances, as the other cited cases show, a demand

made at a date beyond the period of limitations, does not toll the statute. In the *Douglas* case the averment was that demand was made nine years after the cause of action accrued and suit was brought within four years thereafter. In the *Stearns* case it was alleged demand was made four years and nine months after accrual of cause of action, and suit begun within four years thereafter. The statute of limitations was held a bar in both.

Though the action was in equity, an action at law might have been maintained (*Stearns* v. *Hibben Dry Goods Co., supra; Russell* v. *Todd,* 309 U. S. 280, 289), and the statute governing such an action is applicable.

Not only have petitioners failed to show "special circumstances" justifying their delay in making demand (*Keithler* v. *Foster, supra*), but the court below has held they were guilty of laches, an independent ground of decision, which, though the question be a close one, we ought not, under our settled practice, to reexamine.

For these reasons I think that, despite the erroneous view of the Circuit Court of Appeals as to the law of Ohio on the point decided by the State Court of Appeals, the judgment should be affirmed.